BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LEO NILGES	)	
Claimant	)	
	)	
VS.	)	
	)	
STATE OF KANSAS	)	
Respondent	)	Docket Nos. 1,046,360 and
	)	1,046,362
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the November 9, 2010, Award, as well as an Order dated November 4, 2010, both entered by Administrative Law Judge Brad E. Avery.[1] The Board heard oral argument on February 9, 2011. Jan L. Fisher, of Topeka, Kansas, appeared for claimant. Bryce D. Benedict, of Topeka, Kansas, appeared for respondent.

In the Order dated November 4, 2010, the Administrative Law Judge (ALJ) sustained the objection of claimant's attorney to the entering of Exhibits 2, 3, 4 and 5 to the deposition of Dr. Chris Fevurly. The exhibits were returned to respondent and were not considered as part of the record.

In the Award entered November 9, 2010, the ALJ found that claimant provided respondent with timely written claim of his accident of April 21, 2008. The ALJ found that based on the nature of claimant's injury, the rating opinion of Dr. P. Brent Koprivica was more appropriate than was that of Dr. Chris Fevurly and that claimant had a 15 percent functional impairment to the body as a whole. Claimant was terminated from his job at

[1] Docket Nos. 1,046,360 (Date of accident 4-21-08) and 1,046,362 (Date of accident 1-15-09) were consolidated, and both the Award and the 11-4-10 Order were entered in both docketed cases. In No. 1,046,362, the ALJ denied benefits, finding claimant suffered no permanent injury as a result of his January 15, 2009, accident. The Notice of Appeal listed Docket No. 1,046,360 only. Nevertheless, as the two docketed claims were consolidated, this appeal is of the ALJ's Award, which includes both docketed claims.

respondent, and the ALJ found he was entitled to a work disability of 75 percent, based on a 100 percent wage loss and a 50 percent task loss.

The Board has considered the record and adopted the stipulations listed in the Award. The Board has not considered the transcript of the preliminary hearing held August 19, 2009, because the parties agreed that the ALJ announced off the record at the regular hearing that he would not consider that testimony absent a stipulation by the parties. There was no such stipulation.[2]

ISSUES

In Docket No. 1,046,360, respondent maintains that claimant failed to give it timely written claim and, therefore, this claim is barred. Respondent argues that claimant failed to make a written claim for benefits until more than 200 days from the date of the April 21, 2008, accident. Further, respondent asserts it was not required to file an accident report under K.S.A. 44-557(a), as the statute only requires that such report be made where the employer has knowledge of the accident and the accident caused the employee to be wholly or partially incapacitated for more than the remainder of the day, shift or turn on which the injury occurred.

Respondent also argues that claimant is not entitled to an award of work disability as he only suffered a scheduled injury. In the event the Board finds that claimant is entitled to an award of work disability, respondent contends that claimant failed to prove his task loss. With respect to the Order dated November 4, 2010, respondent contends the ALJ improperly excluded certain documents from the record that it offered as exhibits to the deposition of Dr. Fevurly.

Claimant asserts that respondent did not file a report of accident within 28 days of being notified of his April 21, 2008, accident. Therefore, the period of time claimant was allowed to file a claim was extended from 200 days to 1 year from the date of accident, per K.S.A. 44-557. Claimant argues that respondent was notified of the accident and was aware that his injury was such that he was at least partially incapacitated, and an accident report should have been filed. Claimant further asserts that both Drs. Koprivica and Fevurly agreed that claimant sustained a permanent impairment of function to the body as a whole for an aggravation of preexisting degenerative disc disease. Claimant also asserts that respondent's argument that certain tasks were left off Dick Santner's task list is conjecture and that claimant has a 50 percent task loss as per the testimony of Dr. Koprivica. Claimant further contends that the ALJ's Order of November 4, 2010, should be affirmed.

The issues for the Board's review are:

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[2] The Board knows of no basis for excluding the preliminary hearing testimony, but K.S.A. 2010 Supp. 44-555c(a) limits the Board's review to the issues and evidence considered by the ALJ.

(1) Did claimant provide respondent with timely written claim?

(2) Did claimant suffer a scheduled injury or an injury to the body as a whole?

(3) Was the task list prepared by Dick Santner complete?

(4) What is the nature and extent of claimant's disability?

(5) Did the ALJ improperly exclude documents from the record?[3]

FINDINGS OF FACT

Claimant was employed by respondent as an equipment operator with the Kansas Department of Transportation (KDOT). As such, he performed maintenance on highways, repaired signs, mowed, and worked on culverts. On April 21, 2008, claimant had climbed on the back of a water truck to fasten down a lid. On his way off the truck, his feet slipped. He had both hands on the top of the bed of the truck; and when his feet slipped, he felt a yank on his right shoulder. He immediately felt pain in his shoulder area, and within a couple hours started having pain in his upper back.

Claimant reported his accident to his supervisor, Garrett Brandt, at the end of his shift. Claimant said he asked to fill out an accident report but was not given a report form to complete. Claimant did not ask for medical treatment at that time because he knew he had to fill out an accident report before he would get medical treatment under workers compensation. Mr. Brandt testified that claimant told him about his accident on the day the accident occurred. Mr. Brandt said he then asked if claimant wanted to fill out an accident report, but claimant declined, stating, "[N]o, I will try to work it out."[4] Mr. Brandt said that he prepares an accident report if an employee requests one to be completed or if the employee has an obvious or serious injury. Mr. Brandt said that some time after the accident, probably within a month, claimant asked to have a report filled out, and he filled out a report at that time. Upon further questioning, however, and after being advised that the accident report bore a date of December 2, 2008, Mr. Brandt could not say whether the report was filled out within 30 days, 60 days, or 8 months after the accident.

Claimant continued to work and continued to have pain in his right shoulder and upper back. He said he was unable to perform some parts of his job, especially those that

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[3] All of the issues raised by respondent, the appellant herein, pertained to docket No. 1,046,360. The brief of claimant/appellee listed the issues as "I. Timely written claim; and II. Nature and extent of disability." Presumably, Issue No. 1 applied only to Docket No. 1,046,360, as timely written claim was admitted by respondent in Docket No. 1,046,362. The issue as to the nature and extent of claimant's disability applies to both docketed claims.

[4] Brandt Depo. at 23.

involved lifting above his head. Claimant said that he would ask coworkers to do the heavy lifting involved in his job. Two of claimant's coworkers, Wesley Leisure and John Bruns, corroborated claimant's testimony that coworkers assisted him in performing his job duties. Mr. Brandt testified he had no discussions with claimant or any other employee about whether claimant was able to perform all his job functions because of physical problems with his shoulders or upper back.

Claimant missed time from work because he sought treatment on his own from a chiropractor, Dr. Larry Buck.[5] Claimant testified that when requesting sick leave, he would tell Mr. Brandt that he needed to see a chiropractor for treatment for his upper back, but he did not specifically say the chiropractor visits were for treatment of a work-related injury. Mr. Brandt testified he knew claimant took time off to see a chiropractor, and he assumed claimant was seeing a chiropractor for back problems because that is why most people go to a chiropractor. However, Mr. Brandt testified that claimant never told him the reason he was going to the chiropractor, and he did not ask.

Claimant testified that he asked Mr. Brandt several times to have an accident report filled out, but Mr. Brandt would not do so. Finally, claimant went over Mr. Brandt's head to Hugh Vogel and told him he needed an accident report filled out. Claimant said the next day, he was provided with an accident report form. The accident report was filed with the Division of Workers Compensation on December 4, 2008. Subsequently, respondent provided claimant with medical treatment with Dr. John Carter at the Olathe Occupational Medical Clinic. Dr. Carter took x-rays of claimant's right shoulder and sent claimant to physical therapy. Claimant also had an MRI of his upper back, neck and right shoulder areas. Claimant was later referred to Dr. Adrian Jackson by respondent, and again was sent to physical therapy. However, none of the treatment helped, and in January 2010, Dr. Jackson released claimant from treatment with no restrictions. Claimant said he tried to work, but he did not get along very well.

The first time claimant saw Dr. Buck after the April 21, 2008, accident was on May 2, 2008. At that time, claimant described his accident at work on April 21, 2008, when he fell from a truck. He had complaints of right shoulder pain and pain between his shoulders. Dr. Buck treated claimant's right shoulder and his thoracic and cervical spine areas. On his subsequent visit on May 30, 2008, claimant voiced these same complaints, as well as cervical spine pain. In addition, claimant had complaints of right knee pain, headaches, and muscle spasm at the base of his skull. Claimant's subsequent visits included these same or similar complaints.

Dr. P. Brent Koprivica, who is board certified in preventative medicine and occupational medicine, examined claimant twice, both times at the request of claimant's attorney. Dr. Koprivica reviewed claimant's medical records and MRI scan. He first saw

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[5] Claimant had been treated by Dr. Buck previous to his accident on April 21, 2008. He was not being treated for any specific injury or problem but only to make sure he "stayed in line." R.H. Trans. at 11.

claimant on August 6, 2009. Claimant gave Dr. Koprivica a history of injury on April 2008 when his feet slipped out from under him while trying to put a lid on a water truck, and instead of falling to the ground, he held himself up by grabbing hold with both arms. In so doing, claimant jerked his neck. Dr. Koprivica said that type of sudden, unexpected force in the neck and upper back could result in a disc herniation. Claimant also gave Dr. Koprivica a history of a second accident that occurred in January 2009 when a chair collapsed from under him. Claimant told Dr. Koprivica that after the second accident, he had an escalation of his symptoms that continued.

Based on the history, the medical records, the MRI, and his physical examination of claimant, Dr. Koprivica diagnosed claimant with chronic cervical thoracic pain due to an aggravating injury of a permanent nature to degenerative disc disease with a significant disc herniation at C6-7. Dr. Koprivica attributed this diagnosis to claimant's work-related accidents. Although both accidents contributed to claimant's condition, he felt the more significant accident of the two was the first injury, which resulted in the onset of the radicular symptoms. Dr. Koprivica believed claimant's cervical disc herniated at the time of his work accident in April 2008, since claimant had symptoms immediately in terms of symptoms radiating into his arms.

Dr. Koprivica saw claimant for the second time on February 5, 2010. Since Dr. Koprivica's first examination of claimant, claimant had returned to Dr. Jackson, who had ordered cervical epidural steroid injections. But claimant declined that treatment. Claimant had more physical therapy, but it did not provide him with any relief. Claimant told Dr. Koprivica that he had attempted to return to work in January 2010 and had been back to work almost two weeks. Claimant said he had not been given any work restrictions, and he was having significant problems with neck pain and tingling in his arms. Dr. Koprivica performed a physical examination of claimant on February 5, 2010, after which he opined that claimant suffered from a disc herniation at C6-7 with chronic cervical thoracic pain with radicular symptoms into the upper extremities.

Using the AMA *Guides*,[6] Dr. Koprivica rated claimant as being in the DRE cervicothoracic Category III, which assigns a 15 percent whole person impairment. He believed greater significance should be given to the first injury of April 2008 over the January 2009 injury. Dr. Koprivica recommended that claimant not frequently or constantly lift or carry items. For below chest level activities, Dr. Koprivica recommended claimant be restricted to 50 pounds maximum for occasional lifting or carrying. For overhead activities, claimant should be restricted to occasional lifting to less than 30 pounds. Claimant should avoid working on slick surfaces, jarring of the head and neck, repetitive pushing or pulling activities, and frequent or constant above shoulder activities. Claimant should be able to get out of a truck where whole body vibration is occurring while sitting.

[6] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Koprivica reviewed a task list prepared by Dick Santner. Of the 10 tasks on the list, he opined that claimant is unable to perform 5, for a 50 percent task loss. He did not believe that claimant was totally disabled.

Dr. Chris Fevurly is board certified in internal medicine and preventative medicine with a specialization in occupational medicine. At the request of respondent, he examined claimant on March 11, 2010. He diagnosed claimant with chronic cervical thoracic pain with symptoms suggestive of radiculitis from the cervical spine. He did not believe claimant's symptoms met the criteria for radiculopathy. He also diagnosed claimant with multilevel degenerative disc disease with disc herniations at C5-6 and C6-7.

Based on the AMA *Guides*, Dr. Fevurly rated claimant as being in DRE cervicothoracic Category II for a 5 percent permanent partial impairment to the body as a whole. He opined that claimant's neck symptoms and sporadic radiculitis are due to advanced cervical degenerative disc disease and cervical spondylosis. He found no objective factors of radiculopathy–no motor weakness, no sensory deficit, no loss of deep tendon reflexes, and no objective evidence for cord impingement such as upgoing Babinski's or positive Hoffman test.

Dr. Fevurly said claimant's degenerative disc disease and cervical spondylosis are not related to his employment but that claimant aggravated his degenerative disc disease by the heavy labor he performed at work. Dr. Fevurly believes that claimant aggravated his cervical thoracic degenerative disc disease when he partially fell off the truck on April 21, 2008. Dr. Fevurly testified that a significant number of people with disc herniations are asymptomatic. He could not say with any degree of medical certainty whether claimant's herniation occurred on April 21, 2008. Also, he said no suppositions can be made about whether the disc herniation was present on April 21, 2008, based on the fact that claimant was able to work several months after injury. Regardless of whether the disc herniation occurred on April 21, 2008, Dr. Fevurly's opinion is that claimant suffered an aggravation of his preexisting degenerative disc disease through his work activities and specifically the accident of April 21, 2008. Claimant was asymptomatic in these areas prior to the work-related accident.

Dr. Fevurly recommended that claimant restrict his lifting to no greater than 50 pounds once or twice a day, occasionally he could lift 35 pounds, and frequently he could lift to 20 pounds. Lifting above shoulder level should be restricted to 10 pounds on an occasional basis with avoidance of repetitive overhead work with either upper extremity.

Dick Santner, a vocational rehabilitation counselor, interviewed claimant on March 22, 2010, at the request of claimant's attorney. He prepared a list of 10 tasks that claimant had performed in the 15-year period before his April 2008 accident. Two tasks included on the list involve claimant's work when he was self-employed as a rancher. Claimant lives on a 350 acre farm and has a cattle operation. The only tasks listed for that operation were repairing and replacing fence, posts and gates and feeding cattle large round bales

of hay, as well as salt and mineral blocks. Claimant testified that his only task involved in his cattle operation is feeding them in the winter, which he said was all done mechanically as he does not have square bales. There was no other testimony from either claimant or Mr. Santner about other possible tasks involved in running a cattle operation.

Respondent's attorney marked as Exhibit 2 Dr. John Carter's medical report dated December 8, 2008. Dr. Fevurly was then shown a copy of this report, and was asked:

> Q. [by Respondent's Attorney] Okay. And does that indicate that at that time [claimant] was complaining of para-thoracic pain and the doctor felt that the claimant . . . had right shoulder strain?
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> A. [by Dr. Fevurly] Right.
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> [Claimant's Attorney]: I'm going to object to this line of questioning. This is, basically, just bootlegging in another doctor's medical record. And this isn't even a medical record that he has as part of his evaluation, so he can't even say he relied upon as part of his evaluation process. And I'll just get a continuing objection to this line of questions.[7]

Exhibit 4, physical therapy records from Allen County Hospital, was marked for identification. The physical therapy records indicated that on February 9, 11, and 27, 2009, claimant was complaining of thoracic pain. On February 27, claimant reported his right shoulder was doing better and he had a weird feeling that wrapped around the right side of his back and pain between his shoulder blades.

Exhibit 3, Dr. Carter's record of March 25, 2009, was introduced. Respondent's attorney asked:

> Q. [by Respondent's Attorney] All right. Dr. Carter indicates that upon examination of Mr. Nilges there was no cervical pain or reproduction of pain with range of motion testing?
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> [Claimant's Attorney] Same objection. I believe he's already testified he doesn't have these records and maybe I should ask you that. Doctor, do you have these records in your–
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> A. [by Dr. Fevurly] I didn't have the first one, the December '08 record from Dr. Carter, but I have the therapy notes and then I have this one.
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> [Claimant's Attorney] Okay. Still the same objection, you're bootlegging the medical, but okay.[8]

Dr. Adrian Jackson's record of November 16, 2009, was introduced as Exhibit 5.

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[7] Fevurly Depo. at 10.

[8] Fevurly Depo. at 13.

Respondent's attorney moved to introduce Exhibits 1 through 5. Claimant's attorney objected to Exhibits 2 through 5, arguing that respondent's attorney was attempting to bootleg in other physician's records, which was medical hearsay.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-557 provides in part:

> (a) It is hereby made the duty of every employer to make or cause to be made a report to the director of any accident, or claimed or alleged accident, to any employee which occurs in the course of the employee's employment and of which the employer or the employer's supervisor has knowledge, which report shall be made upon a form to be prepared by the director, within 28 days, after the receipt of such knowledge, if the personal injuries which are sustained by such accidents, are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.
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> . . . .
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> (c) No limitation of time in the workers compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced by serving upon the employer a written claim pursuant to K.S.A. 44-520a and amendments thereto within one year from the date of the accident . . . .

K.S.A. 44-520a(a) states in part:

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident . . . .

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[9] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[10] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[11]

K.S.A. 44-510d states in part:

> (a) . . . If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:
>
> . . . .
>
> (13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.
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> . . . .
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> (23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510e states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association

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[9] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[10] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[11] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

> Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

ANALYSIS

In Docket No. 1,046,360, claimant failed to serve a written claim for compensation upon his employer within 200 days of his April 21, 2008, accident. Respondent was provided with notice of the accident on the same day it occurred. Respondent did not file a report of the accident with the Director within 28 days after its receipt of the notice. Nevertheless, claimant's time for serving written claim is not extended beyond 200 days because respondent was not informed and was unaware that claimant's injury was sufficient to wholly or partially incapacitate claimant until December 2, 2008, which was after the 200 days had run. No supervisor was aware that claimant was unable to perform certain job tasks or was missing work to obtain medical treatment due to a work related injury. As such, respondent was not required to make a report of accident to the Director. The claim in Docket No. 1,046,360 is time barred. The remaining issues in this docketed claim are moot.

In Docket No. 1,046,362, claimant alleges he suffered permanent injuries and aggravations of his preexisting conditions when the chair he was sitting on at work on January 15, 2009, broke and he fell to the floor. The ALJ found claimant suffered no permanent injury as a result of this January 15, 2009, accident. On appeal to the Board, neither party argued in their briefs that this accident caused or contributed to claimant's ultimate functional impairment or work disability such that claimant was entitled to an award of permanent partial disability compensation in Docket No. 1,046,362. But during oral argument to the Board, claimant's counsel announced that this docketed claim was not being abandoned and the nature and extent of claimant's disability resulting from this accident should be decided.

After considering the testimony of claimant and of the physicians, the Board agrees with the ALJ that claimant's upper back and spine was not permanently injured or aggravated in the accident of January 15, 2009. Although Dr. Koprivica initially seemed to apportion his rating and restrictions between the two accidents, he ultimately opined that the first accident, the fall from the truck on April 21, 2008, was the significant event, not the accident of January 15, 2009. Likewise, Dr. Fevurly initially attributed the aggravation of claimant's preexisting degenerative disc disease to the accident of April 21, 2008, not to the accident of January 15, 2009. However, he added that if claimant's cervical symptoms did not begin until after January 15, 2009, then the second accident would be the more significant event. Claimant said his upper back pain began with the April 21, 2008, accident, referring to pain from his shoulders up to his neck. He did not specifically mention neck pain in his testimony. But claimant did complain of neck pain to Dr. Buck in

May 2008 and on the subsequent visits in 2008. Therefore, the Board affirms the ALJ's findings and conclusions in Docket No. 1,046,362.

CONCLUSION

(1) Claimant failed to serve a timely written claim upon respondent in Docket No. 1,046,360. This finding renders moot the remaining issues in Docket No. 1,046,360, including the issues pertaining to the Order dated November 4, 2010.

(2) Claimant's injury in Docket No. 1,046,362 was temporary, and claimant has not shown that he is entitled to any temporary or permanent disability compensation or medical compensation in this docketed claim.[12]

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated November 9, 2010, is reversed as to Docket No. 1,046,360 but affirmed as to Docket No. 1,046,362.

IT IS SO ORDERED.

Dated this _____ day of February, 2011.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent
Brad E. Avery, Administrative Law Judge

[12] Respondent did not raise any issues in Docket No. 1,046,362, concerning the Order of November 4, 2010.